

Sales distribution list that provided a "Coral Calcium - Product Power Sheet." The Product Power Sheet contained the following passage:

- What are the specific changes they may experience? **More energy; better sleep; decreasing pain; the bottom line is that Coral Calcium breaks down acid in a person's body and makes it more alkaline. If the person has a degenerative condition or disease, this will help break down that acid associated with the disease. So when the person's body reaches a state of alkalinity, they are then healthy. ***
Do not ever tell a customer that any product will cure any disease. Explain to them the concept of acidity v. alkalinity and that will be good enough.

S.J. Ex. 10, at 51:15 - 52:10, and Att. 16 (ITV-138).

125. Barrett received a copy of this power sheet. S.J. Ex. 10, at 53:10 - 54:10, and Att. 17 (ITV-139).

B. The Defendants' Claims for Coral Calcium Are False and Unsubstantiated

126. To establish that the Defendants' claims about Coral Calcium Daily are false and/or unsubstantiated, the FTC has submitted the testimony of expert witnesses Richard J. Wood, Ph.D. and MaryFran Sowers, Ph.D. S.J. Ex. 24 (Wood); S.J. Ex. 25 (Sowers).

127. The FTC provided Dr. Sowers' and Dr. Wood's reports to counsel for the Defendants in March 2005. S.J. Ex. 20, at ¶ 3 and Att. 1.

128. Neither the DMC/ITV Defendants nor the Stern Defendants attempted to depose either Dr. Sowers or Dr. Wood. *Id.* at ¶ 4.

129. Neither the DMC/ITV Defendants nor the Stern Defendants provided the Commission with reports from any experts in support of their claims about coral calcium's efficacy in preventing, treating, and curing disease, or their claims about the absorbability of coral calcium. *Id.* at ¶ 5.

130. Dr. Wood is the Laboratory Director at the Mineral Bioavailability Laboratory of

the USDA Human Nutrition Research Center on Aging at Tufts University, and an Associate Professor in the Friedman School of Nutrition at Tufts University. Dr. Wood has more than 20 years experience evaluating the body's absorption of minerals. S.J. Ex. 24, at 1-2.

131. Dr. Wood is an expert on the bioavailability of minerals, including calcium, in the human body. *Id.* at 1.

132. Dr. Wood stated that based on his review of the scientific literature on the topic, the numerous studies he had conducted, and his training, expertise, and research concerning the bioavailability of minerals, there is no reliable and competent scientific evidence that the body absorbs significantly more – in some cases up to fifty (50) times as much – of the calcium contained in Coral Calcium Daily, and at a rate significantly faster – in some cases up to fifty (50) times faster – than the calcium contained in a commonly available antacid calcium product. *Id.* at 2-3, 10-11.

133. Dr. Wood also stated that there is no reliable and competent scientific evidence that the body absorbs 100 percent of the calcium contained in Coral Calcium Daily. *Id.* at 3.

134. Dr. Wood stated that it is generally accepted that human studies are required to support a scientific finding concerning the bioavailability (that is, the extent to which a nutrient is absorbed into the body's bloodstream after ingestion) of a test compound in the human body. *Id.* at 1, 6.

135. Dr. Wood stated that it is generally accepted within the scientific community that no dietary calcium source is 100 percent absorbable in the body. *Id.* at 4. The extent of the calcium absorbed in the body varies widely, depending on several factors, including the form and dose of calcium taken, the physiological status and diet of the person who ingests the calcium and the presence of other nutrients and hormones at the time the calcium is consumed. *Id.* at 4-5.

136. Dr. Wood stated that in reviewing the body of scientific literature on the absorbability of different sources of calcium, he found only one small study that evaluated the bioavailability of any type of coral-derived calcium source. *Id.* at 3.

137. Dr. Wood stated that although the subjects in this study absorbed more of the calcium derived from coral calcium than they did the calcium derived from calcium carbonate, the study's findings alone cannot be extrapolated to support the claims that (a) the body absorbs significantly more – in some cases up to fifty (50) times as much – of the calcium contained in Coral Calcium Daily, and at a rate significantly faster – in some cases up to fifty (50) times faster – than the calcium contained in a commonly available antacid calcium product; and (b) the body absorbs 100 percent of the calcium contained in Coral Calcium Daily. *Id.* at 6-7, 8-9.

138. Dr. Wood stated that in the bioavailability field, it is generally accepted that more than just the data from a single 12-subject study would be required to support a scientific finding concerning the bioavailability of a nutrient in the human body. *Id.* at 8.

139. Dr. Wood stated that there is no competent and reliable scientific evidence supporting the claims that the body absorbs significantly more of the calcium in coral calcium supplements, and does so at a significantly faster rate, than the calcium in commonly available calcium supplements. *Id.* at 7.

140. Dr. Sowers is a Professor in the Department of Epidemiology at the University of Michigan's School of Public Health, and Director of the Center for Integrated Approaches to Complex Diseases. She is also a Professor in the Department of Obstetrics and Gynecology and the Department of Internal Medicine at the University of Michigan. S.J. Ex. 25, at 1.

141. Dr. Sowers is an expert on the bioavailability of minerals, including calcium, in the human body. *Id.*

142. Dr. Sowers has authored or co-authored more than 140 articles in peer-reviewed journals, 18 book chapters, and numerous abstracts evaluating the relationship between nutrition and other environmental factors and the incidence of disease in human populations. *Id.*

143. Dr. Sowers stated that there is no competent and reliable scientific evidence to support the claim that calcium or coral calcium is an effective treatment or cure for cancer. *Id.* at 19.

144. Dr. Sowers stated that there is no competent and reliable scientific evidence to support the claim that calcium or coral calcium is an effective treatment or cure for heart disease. *Id.*

145. Dr. Sowers stated that there is no competent and reliable scientific evidence to support the claim that calcium or coral calcium is an effective treatment or cure for Parkinson's disease. *Id.*

146. Dr. Sowers stated that there is no competent and reliable scientific evidence to support the claim that calcium or coral calcium is an effective treatment or cure for autoimmune diseases, including multiple sclerosis and lupus. *Id.*

147. Dr. Sowers stated that she has located no scientific studies that conclude that calcium supplements can reverse or cure cancer. *Id.* at 5, 7.

148. Dr. Sowers stated that she has analyzed the scientific research on calcium that is published in the Journal of the American Medical Association ("JAMA"), the New England Journal of Medicine, and other reputable medical journals, and no studies suggest that calcium supplements cure and/or reverse cancer in the body. *Id.* at 5.

149. Dr. Sowers stated that there is no competent and reliable scientific evidence to support the claim that scientific research published in JAMA, the New England Journal of

Medicine, and other reputable medical journals proves that calcium supplements are able to reverse and/or cure cancer in humans. *Id.* at 3, 5.

150. Dr. Sowers stated that although some published scientific studies suggest that dietary and supplemental calcium may be associated with lower occurrence of pre-cancerous polyps in the colon, the findings of these studies cannot be extrapolated to support a claim that calcium supplementation is an effective means to treat or cure cancer, including colorectal cancer. *Id.* at 5, 6.

151. Specifically, Dr. Sowers describes a 1998 study published in JAMA and a 1999 study from the New England Journal of Medicine, neither of which supports the proposition that calcium supplements reverse or cure any form of cancer. *Id.* at 6-9.

152. Dr. Sowers stated that, at most, the JAMA study suggests that a low-fat dairy diet with 1200 mg. of calcium may marginally reduce the proliferation rate and nuclei size of abnormal cells in the colon. *Id.* at 8. The study in no way suggests that calcium or calcium supplements will reverse or cure any type of cancer. *Id.*

153. Dr. Sowers stated that the New England Journal of Medicine study tested the effects of calcium supplementation on subjects who had a recent history of pre-cancerous colon polyps. After four years, 31% of the calcium group and 38% of the placebo group had at least one new polyp. Dr. Sowers stated that although the study found that calcium supplementation was associated with a modest reduction of recurrent polyp formation in this segment of the population, it does not suggest that calcium supplements are an effective treatment or cure for colorectal cancer, or any other form of cancer, and does not suggest that calcium supplements cure or reverse cancer. *Id.* at 8-9.

154. Dr. Sowers stated that heart disease, which is the leading cause of death in the

United States, encompasses many different conditions, and that hypertension – chronically high blood pressure – is one of the four risk factors for heart disease. *Id.* at 11.

155. Dr. Sowers stated that she is not aware of any studies that support a finding of calcium as an effective means to treat or cure hypertension, let alone heart disease. *Id.* at 13.

156. Dr. Sowers stated that taken together, epidemiological and clinical studies suggest that calcium supplementation may have a statistically significant, although very small, blood pressure-lowering effect in certain populations. *Id.* at 17. She stated that the studies do not, however, suggest that calcium supplementation is effective in the treatment or cure of heart disease or chronic blood pressure in the general population. *Id.* at 17-18.

157. Dr. Sowers stated that after having conducted several bibliographic searches and relying on her general knowledge of calcium, she is aware of no scientific research literature that suggests a possible association between calcium intake and treatment of lupus, multiple sclerosis, or any other autoimmune disease or Parkinson's disease. *Id.* at 18.

158. On October 12, 2005, the Food and Drug Administration issued a letter responding to a petition seeking authorization for health claims about the relationship between calcium consumption and reduced risk of certain cancers and other health related conditions. The petitioners sought permission to claim, *inter alia*, that calcium may reduce the risk of colon cancer, rectal cancer, colorectal cancer, breast cancer, and prostate cancer; or that it may reduce the risk of recurrent colon polyps. S.J. Ex. 12, at ¶ 9 and Att. 7.

159. FDA noted that the petition had cited hundreds of publications, but that “the review articles, meta-analysis, book chapters, and abstracts do not contain sufficient information on the individual studies which they reviewed and, therefore, FDA could not draw any scientific conclusions from this information. . . . FDA must be able to review the critical elements of a

study to determine whether any scientific conclusions can be drawn from it.” *Id.* at 7-8.

160. FDA also stated that although it:

uses animal and *in vitro* studies as background information regarding mechanisms of action that might be involved in any relationship between the substance and the disease, and they can also be used to generate hypotheses or to explore a mechanism of action, . . . they cannot adequately support a relationship between the substance and the disease in humans.

Id. at 8. Furthermore, of the 50 intervention studies cited by the petitioners, 48 of those did not provide information from which scientific conclusions could be drawn regarding the substance/disease relationship . . .” *Id.*

161. FDA concluded there was no credible evidence to support qualified health claims about calcium and breast cancer or prostate cancer, but stated that it would consider exercising enforcement discretion for the following claims:

“Some evidence suggests that calcium supplements may reduce the risk of colon/rectal cancer, **however, FDA has determined that this evidence is limited and not conclusive.**”

“Very limited and preliminary evidence suggests that calcium supplements may reduce the risk of colon/rectal polyps. **FDA concludes that there is little scientific evidence to support this claim.**”

Id. at 19 (emphasis added).

C. Consumer Injury Resulting From Defendants’ Sale of Coral Calcium Daily

162. Triad’s best estimate of gross 2002-2003 coral calcium revenues from the infomercial is \$40 million. S.J. Ex. 16, at 40:21 - 41:15, and Att. 2 (Triad-7).

163. Barrett estimates the sales resulting from his coral calcium infomercial at \$40-\$50 million. S.J. Ex. 7, at 69:3 - 69:9.

III. SUPREME GREENS WITH MSM

A. The Advertising and Sale of Supreme Greens With MSM

164. Supreme Greens with MSM ("Supreme Greens") is a dietary supplement that contains a proprietary blend of the following 39 ingredients: alfalfa leaf; parsley leaf; carrot root; shave grass; rosemary leaf; beet root; celery seed; dandelion leaf; spearmint leaf; cornsilk; grapefruit pectin; peppermint leaf; white willow bark; bilberry leaf; broccoli stalk; cabbage leaf; red raspberry leaf; sage leaf; echinacea tops; MSM [metholsulfonylmethane]; okra; spinach leaf; strawberry leaf; watercress leaf; wheat grass; wintergreen leaf; alfalfa sprouts; ginger root; barley grass; barley sprouts; beet tops; dog grass; wheat sprouts; garlic bulb; kale leaf (*brassica oleracea* var *acephela*); Pau d'arco bark; slippery elm bark; goldenseal leaf; and aloe 200:1. S.J. Ex. 5, at ¶ 7 and Att. 5.

165. The Supreme Greens label defines a serving of Supreme Greens as 3 capsules, says that each serving has 1925 mg. of the proprietary blend, and recommends two servings per day. S.J. Ex. 5, at Att. 5.

166. In April 2003, ITV entered into a distribution agreement with settling defendant Healthy Solutions that granted ITV the right to market and sell Supreme Greens. S.J. Ex. 7, at 79:25 - 80:14, and Att. 10 (ITV-267) ; S.J. Ex. 4, at ¶ 9.

167. The distribution agreement was signed by Barrett and settling defendant Howell (as President of Healthy Solutions). S.J. Ex. 7, at 80:4 - 80:9, and Att. 10 (ITV-267) at 13.

168. According to settling defendant Gregory Geremesz, Healthy Solutions' chief executive officer, during the negotiation of the ITV-Healthy Solutions Distribution Agreement for Supreme Greens, "ITV's representatives indicated that they were experts in making infomercials that were both persuasive and compliant with the FTC and FDA requirements," and

that they paid an attorney to ensure that the infomercial would be compliant with the requirements of both of those agencies. S.J. Ex. 12, at ¶ 10 and Att. 8.

169. The distribution agreement stated that ITV would produce an infomercial for Supreme Greens, and that settling defendant Alex Guerrero would appear in that infomercial. S.J. Ex. 7, at Att. 10 (ITV-267) at 6-7.

170. DMC handled all aspects of the Supreme Greens program, including buying the media, answering the phones, shipping the product to consumers, and customer service. S.J. Ex. 7, at 86:11 - 86:19.

171. In April 2003, Guerrero traveled to Boston, where he and Barrett taped an infomercial for Supreme Greens using a set that showed a nighttime skyline in the background. *Id.* at 81:17 - 81:24, 83:21 - 83:25.

172. The taping was done in ITV's studios. *Id.* at 82:16 - 82:18.

173. The infomercial featuring Barrett and Guerrero was edited into its final form by Steve Paris, who is Barrett's cousin. *Id.* at 84:8 - 84:21, 244:17 - 244:18.

174. On August 5, 2003, Barrett's sister Eileen described the Supreme Greens infomercial as "very controversial." *Id.* at 67:18 - 67:25 and Att. 11 (ITV-268).

175. In August 2003, the DMC/ITV Defendants started to disseminate the Supreme Greens infomercial. S.J. Ex. 7, at 99:13 - 99:15; Ex. 21, at 137:18 - 137:25, and Att. 4, 5, and 6 (ITV-102, ITV-103, ITV 104).

176. The decision to go ahead and disseminate the Supreme Greens infomercial was based on the successful results of test airings, and was made by Barrett. *Id.* at 93:3 - 93:14.

177. As of August 2003, it was not the practice of the DMC/ITV Defendants to have infomercials reviewed for compliance with the law prior to airing. S.J. Ex. 8, at 147:20 - 148:5.

178. The DMC/ITV Defendants did not have a lawyer review the Supreme Greens infomercial before the infomercial went on the air. S.J. Ex. 7, at 90:21 - 91:11, 110:23 - 111:1.

179. The DMC/ITV Defendants did not have anyone with a medical or science background review the Supreme Greens infomercial before the infomercial went on the air. S.J. Ex. 8, at 147:14 - 147:19.

180. Maihos was aware of the content of the Supreme Greens infomercial when it began airing in August 2003. S.J. Ex. 8, at 148:6 - 148:10.

181. In August 2003, Maihos received the following substantiation materials from Healthy Solutions, LLC: a one-page paper by Guerrero entitled "Acid vs Alkaline: Theory of Acidity and Alkalinity"; a list of alkaline foods; a one-page promotional sheet touting Supreme Greens; and a quotation from a 1936 U.S. Senate document. S.J. Ex. 8 at 134:16 - 135:2, and Att. 3 (ITV-230).

182. Maihos does not consider these documents to be substantiation for the claims made in the Supreme Greens infomercial. *Id.* at 135:16 - 135:22.

183. On September 17, 2003, Barrett sent Guerrero an email stating "Please get me ASAP the documentation folder regarding studies mentioned in the Supreme Greens infomercial. I need this information ASAP." Guerrero responded "I will be putting it together this week." S.J. Ex. 7, at 99:22 - 101:6, and Att.12 (ITV-269).

184. Guerrero did not provide Barrett with the documentation he was seeking. S.J. Ex. 7, at 101:10 - 101:15.

185. In September 2003, the DMC/ITV Defendants received the following additional materials from Healthy Solutions, LLC: written testimonials from a former Olympic athlete and a professional football player; a one-page discussion of chlorophyll; and another promotional

piece for Supreme Greens. S.J. Ex. 8, at 136:15 - 136:25 - 137:10, and Att. 4 (ITV-231).

186. In August or September 2003, Erik Limbaugh reported to the other DMC managers at a regular managers' meeting that he had repeatedly asked Guerrero for scientific studies on Supreme Greens but had not received any, and had been told that the study of 200 terminal cancer patients described in the infomercial was not "a well-documented study." S.J. Ex. 10, at 84:9 - 84:3.

187. At the time the DMC/ITV Defendants started airing the Supreme Greens infomercial, Barrett was aware of the FTC's concerns about the coral calcium infomercial. S.J. Ex. 7, at 91:22 - 92:2.

188. Numerous statements are made in the Supreme Greens infomercial about the benefits of Supreme Greens including the following passages:

A. MR. BARRETT: Dr. Guerrero claims that most chronic degenerative diseases -- such as cancer, arthritis, diabetes, even the number one killer out there, heart disease -- can and are being cured and there are natural healing techniques being suppressed in this country. We have a very controversial show, so stay with us.

B. MR. BARRETT: You treat all types of people from pro athletes in their prime of life?

DR. GUERRERO: Yes.

MR. BARRETT: All the way to people that, you know, have chronic disease that their doctors have told them to really get their affairs in order and go home.

DR. GUERRERO: Yeah. I mean, our primary concern -- at least in my clinic, anyway, is to make sure that the body, you know, stays in an environment that's conducive for cell regeneration. You know, we do a lot of weight loss, we do a lot of anti-aging, we do a lot of, you know, making sure professional athletes can stay at their peak performance all the time. And we also see people that have chronic conditions -- like you mentioned before, we've got cancer patients, Aids patients, people with MS, diabetes, Parkinson's.

And understanding the chronic condition that --you know, I've always stated that -

MR. BARRETT: But you're treating them with natural therapies.

DR. GUERRERO: We are.

C. DR. GUERRERO: ... And that's why I think a lot of the doctors that you see coming out now are crossing over. You do see a lot of doctors -- and I deal with a lot of them, I have several oncologists that refer patients to me. You have several of them now that are understanding the value between, you know, conventional and alternative. And they really are trying to incorporate those.

MR. BARRETT: You teach them of this acid alkaline balance in the body, because it's simple for people to understand and when they alkalize their body, as you say, they're in a better position to heal themselves?

DR. GUERRERO: Absolutely.

MR. BARRETT: Versus an acid body?

DR. GUERRERO: Well, from, you know, in -- in biology we've learned that you've got disorders like yeast, fungus, bacterias, viruses, molds, all those are living organisms that need an environment in which to thrive and proliferate and grow. And they can only survive in an acid base. So if we can change the body's fluids and tissues to a more alkaline base, now you have an environment that is no longer conducive for the proliferation or growth of a degenerative condition.

MR. BARRETT: And when you alkalize the body, these -- a lot of these symptoms, a lot of these diseases are going to --

DR. GUERRERO: Well, they --

MR. BARRETT: -- fall by the wayside.

DR. GUERRERO: Well, they all do, because they're a result of over acidification of the blood and tissues. ...

* * *

MR. BARRETT: -- somebody know out there, if they're watching our show right now, how would they know if they have an acid system or if they have a high acid body, what are some tell tale signs, so to speak? You're saying if someone is acid, they're on the road to disease?

DR. GUERRERO: Right. You're in a state of degeneration. . . .

D. MR. BARRETT: And now here's the question: If I alkalize my body, am I going to come up with one of these chronic degenerative diseases?

DR. GUERRERO: No.

MR. BARRETT: Such as cancer, arthritis --

DR. GUERRERO: No.

MR. BARRETT: How can you say that so confidently?

DR. GUERRERO: I'm very confident in saying that, primarily because of the clinical studies we've done. I've seen it in my -- in my -- in my clinical practice. I've seen it every day in my clinical practice.

MR. BARRETT: Tell me about --

DR. GUERRERO: I treat patients that have conditions --

MR. BARRETT: -- the studies -- tell me about a study that you've done with -- with chronic disease.

DR. GUERRERO: Well, based on acid alkaline principles we wanted to take groups of people that had degenerative conditions -- and, to me, it didn't really matter what their degenerative condition was and I preferred them to have a variety of conditions. So I certainly just didn't want to have a base of liver cancer or bone cancer or prostate cancer or breast cancer. I wanted to, you know, lump them into a group and see what the response would be over time.

Well, now it's been -- you know, now we're going into, you know, eight years and within a five year period of time we took 200 people that had a variety of degenerative conditions. They weren't all the same conditions, they --

MR. BARRETT: Were they terminal?

DR. GUERRERO: They were diagnosed as terminal.

MR. BARRETT: Two hundred people -- now, eight years later, how many of them are still alive?

DR. GUERRERO: Well, I've got -- out of that -- out of those 200 people that were terminal we lost eight. Eight passed away.

MR. BARRETT: And that's amazing. People must have been amazed by those studies.

DR. GUERRERO: Yeah. I mean, it was -- it was really exciting to see at the time. And that's really what solidified, for me, this -- you know, the concepts of acid and alkaline balance. And so, now, over the years I've just been afraid to deviate from what has worked for me in my clinic.

- E. MR. BARRETT: Now, explain. When a patient comes to your office -- whether they have cancer or arthritis, diabetes, you start them on a few standard supplements.

DR. GUERRERO: Right.

MR. BARRETT: One being a product called Supreme Greens, the other one being a coral calcium type product.

DR. GUERRERO: Yes.

- F. MR. BARRETT: What is grapefruit pectin?

DR. GUERRERO: Grapefruit pectin actually is a substance that -- I'll give you a study that they did with grapefruit pectin. They took -- over a 12 month period of time they took, you know, pigs and they gave them high lard diets. And what they did is they tested their arterial plaque before they started the study.

And they gave one group grapefruit pectin and they gave another group nothing, but they both ate the same high lard diet. After 12 months the group that received the grapefruit pectin actually had an 88 percent decrease in arterial plaque than from when they started. That's significant.

* * *

MR. BARRETT: So if you're taking this product and you're healthy now, your arteries are less likely to clog up, you're saying?

DR. GUERRERO: Oh, absolutely.

- G. MR. BARRETT: . . . Now, we have a caller on the line from Oregon. Her name is Kerry. Kerry, are you with us?

KERRY: Yes, I am.

MR. BARRETT: Now, what is your experience been on this Supreme Greens product?

KERRY: Well, you know, I've been overweight for many years and I tried, oh, every diet on the market. I tried Atkins, I tried The Zone, I tried the soup diet, I even tried the popcorn diet and none of them worked. I'd lose some weight and then I'd just gain it back and then some. And so after so many years of trying all these different diets I just gave up because I was just so discouraged, you know. And then a friend of mine recommended that I take the Supreme Greens with MSM, not as a weight loss product, but you know what? As a way to improve my health and my energy because she noticed I was just so tired all the time. Of course, you know, my energy and my health improved, but what was really amazing was that the first week that I was on Supreme Greens with MSM I lost four pounds. And the second week I lost four and-a-half pounds. And I've been on Supreme Greens now for eight months and I have lost a total of 81 pounds. And --

MR. BARRETT: Eighty-one pounds?

KERRY: Eighty-one. Yes.

H.

ON SCREEN:

ITV

**ARE ALL HEALTH PROBLEMS
CAUSED BY AN ACIDIC BODY?**

MR. BARRETT: Okay. Alex, why do so many people lose weight on the product? I know that a lot of people get on the product to either help with their diabetes or maybe their heart disease or even cancer, but they lose weight as a by-product. How come?

DR. GUERRERO: They lose weight as a by-product because, again remember, weight is the -- fat is your body's way of protecting itself from the acidic fluids. And so when you alkalize your --

MR. BARRETT: So when your body's acid -- I mean, a lot of people are taking Prilosec and all these anti-acid --

DR. GUERRERO: Tums and --

MR. BARRETT: -- they -- they're acid.

DR. GUERRERO: Right.

MR. BARRETT: When they get heartburn that means they have a high acid system.

DR. GUERRERO: Yes.

MR. BARRETT: And when you have a high acid system your body needs a layer of protection which is called fat.

DR. GUERRERO: It's called fat.

MR. BARRETT: So when you alkalize your body you don't need that fat?

DR. GUERRERO: You don't need that fat. Your body burns it actually for fuel.

MR. BARRETT: So not only will this product help people get the nutrition they need, but they can actually lose weight on this product. . . .

- I. DR. GUERRERO: Well, you don't crave them. People talk about, Gosh, you know, I just -- I have food cravings. And so they eat and they nibble and they -- because of the food cravings -- that's the yeast inside the body saying, Feed me, I want more, we need more nourishment. It feeds off of sugar. And so it's just constantly. So people say, Gosh, I really don't need that, but I just can't -- I can't -- I can't control myself.

MR. BARRETT: That's --

DR. GUERRERO: So overeating, all those things are a result of too much acid. And so the Supreme Greens with MSM provides that cell with nourishment. If the cell receives nourishment, Don, you're not hungry. It's not asking you for fuel because it has some. It's the difference between being filled and nourished. You eat to get full and in 30 minutes you're going to need to be filled again because your cell never got nourished, it's saying, Donald, give me some vitamins, man, I need some vitamins to keep you going.

- J. DR. GUERRERO: Well, sure. Now -- now there's a lot of formulas out there, so I figured, well, heck, I might as well bring in some nutrients and things that my patients need because I knew they were nutrient deprived. But then as I'm -- as I'm testing these supplements, I realized that their vibrating frequency wasn't high enough to get me in front of the rate of degeneration. I'll give you an example. If the cell vibrates at 70 megahertz and I need 70 megahertz of energy to nourish that cell, now I've got a cancer patient or somebody that is in chronic pain and their vibrational frequency is now at 10 and I give them a nutrient that's vibrating at 60 it'll bring them up to 60 and make them feel pretty good.

But I'm still 10 megahertz shy of getting their cell in front of the rate of degeneration, which is why a lot of people go to alternatives and still suffer. And they say, Well, yeah, I did alternative medicine, but, you know, I didn't get well. Or cancer patients that are in alternatives still die. They die because the nutrients that they are taking is not getting them to the point to where they can actually get in front of the rapid rate of degeneration or the proliferation of their -- of the cancer or whatever it is that they're dealing with at the time. And so I formulated this Supreme Greens with MSM so that I can maintain that high electrical charge.

- K. DR. GUERRERO: . . . And, you know, think about arthritis. Let's talk about arthritis for a minute. Arthritis is an inflammation in the joint. What happens because it's so acidic that when a cell receives nourishment and it breaks it down, the mucosal lining again is so hard that it can't excrete the waste out. So the cell accumulates and just gets bigger and bigger and bigger and bigger so we get inflamed joints. So the MSM really is a great anti-inflammatory.

MR. BARRETT: It acts as --

DR. GUERRERO: Because as a super conductor it makes the cell wall more permeable. So now the cell can actually release all of its metabolic waste.

MR. BARRETT: It takes down swelling.

DR. GUERRERO: And it brings down inflammation.

- L. MR. BARRETT: Tell me about diabetes. I heard you talking to one of the producers before the show about diabetes.

DR. GUERRERO: Well, diabetes really is something that's becoming epidemic.

MR. BARRETT: I heard a lot of people out there have diabetes and don't even know it.

DR. GUERRERO: Sure. Well, you know before -- years ago, you'd just go to your doctor and they used to say, Well, yeah, you have hypoglycemia, you know, just eat -- you know, six, seven, eight small meals a day and you'll be fine. Because they constantly needed that sugar. And what happened was that those people that were hypoglycemic years to come, when they became adults developed diabetes. And so what the medical community learned is that, hey, you know, where we didn't take

hypoglycemia serious before, we now need to take it serious because those are the same people that are getting diabetes today. So now we're not going to call it hypoglycemia anymore, we're going to call it insulin resistance or we're going to label it and call it Syndrome X. So you now have Syndrome X. So now they're coming up with medications to help you deal with Syndrome X when the reality is all you really need to do is if you can nourish the cell, maintain more permeability, your body will metabolize insulin.

M. DR. GUERRERO: Children take it. Animals take it. I had a woman who came to my office, her cat was dying, she took her cat to the vet, the vet said there's really no hope, your cat is going to die. And this is one of my patients, she just said, By the way, do you think this --

MR. BARRETT: So, what did they -- they put it on the food?

DR. GUERRERO: Yeah. She just --

MR. BARRETT: I have a dog that has trouble going up the stairs right now.

DR. GUERRERO: She just mixed the powder in the food. And actually she had to force feed the cat, because the cat wouldn't eat. And now you should see -- now the kitten is actually a cat and did well.

I had another woman whose dog had cancer, had a tumor in the hip. And again, if you -- if you provide an environment where the disease can't proliferate in, can't survive --

MR. BARRETT: It can't grow.

DR. GUERRERO: -- it can't grow, it can't -- can't proliferate -- you know, you cleanse the blood, nourish the cells. All disease is in the blood. If you get nothing more out of what we're talking about here today, Donald, understand that one concept, that all disease is in the blood. Cleanse the blood, nourish the cell. You're now in a state of regeneration and you will stay healthy.

MR. BARRETT: Supreme Greens is the best product, you feel, to cleanse the blood?

DR. GUERRERO: Absolutely no question.

S.J. Ex. 2, at Ex. 6, at 3:23 - 4:4, 5:22 - 6:17, 8:2 - 10:14, 11:6 - 13:2, 15:11 - 15:19, 17:18 -

18:18, 19:9 - 20:10, 20:24 - 22:6, 23:15 - 24:9, 26:4 - 27:5, 28:14 - 29:3, 33:6 - 34:7, 34:17 -

35:22. *See also* S.J. Ex. 4, at ¶¶ 30, 31.

189. In the infomercial, DMC/ITV Defendants provided toll-free telephone numbers for consumers to call to obtain more information or to purchase Supreme Greens with MSM. S.J. Ex. 2, at Ex. 6, at 18:21, 29:5.

190. Seated at a desk with an impressive skyline visible through the window behind him, Barrett opened the Supreme Greens show by welcoming viewers to “another edition of Today’s Health.” S.J. Ex. 2, at Ex. 6, at 3:10 - 3:11. *See also* Amended Complaint [Dkt. No. 67], at Ex. 5 (tape of Supreme Greens infomercial).⁸

191. He concluded the infomercial the same way: “Again, my name is Donald Barrett and we’ll see you next time on Today’s Health. Thanks.” *Id.* at 36:7 - 36:8.

192. Barrett introduced Guerrero as his guest. *Id.* at 3:23 - 4:5.

193. Guerrero’s appearance in the infomercial was specifically called for in the April 2003 Supreme Greens Distribution Agreement between ITV and Healthy Solutions, LLC. S.J. Ex. 7, at Att. 10 (ITV-267), at p. 6.

194. The only disclosures in the original Supreme Greens infomercial that it was paid programming were brief written acknowledgments that appeared only at the very beginning and the very end of the infomercial. S.J. Ex. 2, at Ex. 6, at 3:7 - 3:7, 36:9 - 36:13.

195. The DMC/ITV Defendants also advertised Supreme Greens through the website www.todayshealth.com/supremegreens. S.J. Ex. 2, at Ex. 7; S.J. Ex. 6, at 15:3 - 15:21; S.J. Ex. 5, at ¶ 8 and Att. 6. The following representations appeared on the website:

A. If you or someone you love is suffering from Cancer, Arthritis,

⁸ A VCR tape with the infomercial was filed with the Commission’s original Complaint in May 2004.

Osteoporosis, Fibromyalgia, Heart Disease, Diabetes, Heartburn, Fatigue, Excess Weight, or simply the everyday ravages of aging - **it's time to start down the path to a healthier lifestyle ...**

B. A number of health problems and degenerative conditions have been **linked to highly acidic cell pH:**

- Cancer
- Arthritis
- * * *
- High Blood Pressure
- High Cholesterol
- * * *
- Diabetes
- * * *
- Endometriosis
- * * *
- Overweight
- Heart Disease

So How Do You Rebalance Your Cells pH Levels and Get the Minerals and Nutrients You Need?

According to health professionals, supplements are needed to give the body what it needs. But where most supplements either provide vitamins or protein, Supreme Greens works to help rebalance your cell pH.

* * *

Supreme Greens was formulated by Dr. Alex Guerrero, a renowned physician who has focused his career on working with people with various degenerative diseases and chronic ailments. His breakthrough supplement has already helped thousands of people with cancer, diabetes, arthritis, lupus, fibromyalgia, chronic fatigue syndrome, and many others.

C. I have been overweight for several years. Like many others, I tried every diet on the market from the Atkins Diet to the Soup Diet to the Popcorn Diet. Of course I achieved short spurts of weight loss with these diets, but the weight continued to come back after a short period of time.

After becoming completely discouraged, a friend recommended I try Supreme Greens with MSM*, not as a weight loss product, but as a way to help improve my general health. Although I did begin to enjoy better health and an increase in energy, I also began to lose weight from the

product. In the first week I lost 4 lbs. During the second week I lost 4.5 lbs. This spark of success lit a fire and I have now lost an amazing 81 lbs over the past 8 months.

* * *

Carrie J., OR (consumer testimonial)

S.J. Ex. 2, at Ex. 7, at pp. 1, 2-3, 4 (emphasis in original).

196. DMC and ITV's sales representatives were provided with scripts, "Product Power Sheets", and other information that they were instructed to follow when answering calls relating to Supreme Greens. S.J. Ex. 9, at 70:24 - 71:21, 74:5 - 75:12, 79:6 - 79:10, and Att. 4, 5, 6 (ITV-11) (ITV-12) (ITV-13).

197. On August 28, 2003, DMC sales manager Erik Limbaugh sent an email to "DMC Sales" that contained information about Supreme Greens. In the email, Mr. Limbaugh wrote that according to Guerrero, "Customers with serious degenerative conditions can take anywhere from 12-24 caps/day." Additionally, he wrote that "When the Greens start working, some of the things people will start to notice are mental clarity, weight loss, enhanced digestion, better sleep, less severe morning sickness." S.J. Ex. 10, at 98:24 - 99:22, and Att. 4 (ITV-10).

198. One Product Power Sheet, dated October 19, 2003, contained the following statements: (1) "Should customers take a higher/lower dose for certain medical conditions? **Only people on Cumadin- they need to take ½ a regular dose. Cumadin is a blood thinner**"; (2) "What are the specific chances they may experience (ie more energy, sounder sleep, less pain, etc . . .)? **Mental clarity, weight loss, enhanced digestion, better sleep, less severe morning sickness.** (3) The product contains 980 mg of MSM per three capsules; (4) **How long before product takes effect** or how long before the customer *feels or notices any changes in their body?* **They can start to notice changes in the first 2 weeks.**" S.J. Ex. 9, at

Att. 4 (ITV-11) (emphasis in original).

199. At least one Supreme Greens power sheet discussed the mechanism by which Supreme Greens would purportedly result in weight loss. S.J. Ex. 10, at 122: 10-122: 25 and Att. 4 (ITV-10).

200. A series of Supreme Greens "FAQs" available to the sales representatives stated: In response to the Question "Will it help me with my _____," the FAQ provided that the sales rep would respond "Whats [sic] great about the Supreme Greens, is it doesn't pretend to attack one thing specifcily [sic]. What it does is it gives the body what it needs [sic] to heal itself. And thats the miracle of the human body is that most of the things that go wrong with it will heal itself." S.J. Ex. 10, at 119:10 - 119:21, and Att. 5 (ITV-14).

201. The FAQ also provided the question "Does a person who's already skinny lose weight?" The approved response stated "No. It does'nt [sic.] work that way. The only people that tend to lose weight are people who are overweight. Its not a weight loss product, there's no stimulants or appetite suppressents [sic.]. It works to lose weight by the principles of cellular nutrition." S.J. Ex. 10, at Att. 5 (ITV- 14).

202. At least six different sales scripts versions were used, including scripts dated October 1, 2003, November 5, 2003 (2 versions), December 7, 2003, February 4, 2004, and one undated version. S.J. Ex. 10, at 128:18 - 129:2, 138:23 - 139:2, 139:18 - 140:13, 141:11 - 141:16, 144:3 - 144:9, 145:9 - 146:4, and Att. 6, 7, 8, 9, 10, 11, (ITV-15), (ITV-16), (ITV-17), (ITV-18), (ITV-20), (ITV-22).

203. Barrett was the primary person responsible for making changes in SG scripts. S.J. Ex. 9, at 87:20 87:23.

204. On October 7, 2003, using an undercover name, address, credit card, and phone

line, FTC investigator Christina Turner ordered Supreme Greens through the phone number given during the Supreme Greens infomercial, 1-800-554-2818. S.J. Ex. 5, at ¶ 24, and Att. 19.

205. During that call, Ms. Turner was told by the sales representative with whom she spoke that Supreme Greens “rids your body of your body’s acidity and brings your body to a neutral alkaline state” and “that’s when your body is as healthy as your optimal health, because the things you really want to try to avoid obviously in life, such as cancer, arthritis, fibromyalgia, heart disease, all thrive when your body is in an acidic state,” and that Supreme Greens “helps you lose weight, speed up your metabolism” S.J. Ex. 5, at Att. 19, at p. 5.

206. The DMC/ITV Defendants offered several different pricing plans for Supreme Greens. In general, consumers paid between \$32.98 and \$49.99 per bottle of Supreme Greens, plus shipping. S.J. Ex. 4, at ¶ 29; *see also* S.J. Ex. 5, at Att. 19, at pp. 3-4 (multiple prices mentioned by sales representative).

207. After DMC started to air the Supreme Greens infomercial, some television stations objected to airing the infomercial because of the “cancer cure language in the show” S.J. Ex. 9, at 230:8 - 230:24, and Att. 10 (ITV-81) at DMC 041353 (November 4, 2003 meeting minutes) (“Some stations have issues with the cancer cure language in the show”), and DMC 041358 (referring to stations that rejected the original Supreme Greens infomercial); S.J. Ex. 21, at Att. 1 (ITV-93) (CNBC cancelling media buy because “they do not want the word cancer mentioned”).

208. On or about October 3, 2003, FTC attorneys informed counsel for Barrett and DMC by telephone that they believed a number of claims made in the Supreme Greens infomercial were false and/or unsubstantiated, and that DMC and Barrett had to cease airing the infomercial if they wanted to continue negotiating a resolution of the FTC’s investigation into

coral calcium daily. S.J. Ex. 19, at ¶ 7; S.J. Ex. 7, at 109:5 - 109:9 (Barrett agrees that FTC raised concerns about the Supreme Greens infomercial in October 2003).

209. On or about October 3, 2003, Peter Brooks (an attorney for the DMC/ITV Defendants) sent a facsimile to Maihos. This facsimile included a transcript of the Supreme Greens infomercial with handwritten comments. The facsimile cover page stated "We need to talk about this." Among the handwritten comments written adjacent to a number of the statements in the infomercial were: "sounds like BS," "need scientific support for this" and "the study says it worked for pigs." S.J. Ex. 8, at 151:15 - 152:4, and Att. 5 (ITV-235).

210. On or about October 10, 2003, attorneys for the Commission and counsel for Barrett and DMC had a telephone conversation in which counsel indicated that they had recommended changes to the infomercial, that their clients were committed to editing the existing version of the infomercial in light of the FTC's concerns, and that they would provide the FTC a copy of the revised tape when it was ready. Counsel also committed that the original version of the infomercial would not air more than two weeks after the date of that telephone conversation, and that a revised version would be substituted thereafter. S.J. Ex. 19, at ¶ 8.

211. On or about October 22, 2003, Commission lawyers sent a letter to counsel notifying them that the Supreme Greens infomercial ranked as the 10th most disseminated infomercial in September, and emphasizing the importance to the Commission of the revised version being completed and substituted for the original. S.J. Ex. 19, at ¶ 9.

212. When the DMC/ITV Defendants realized that they "had an issue" with the Supreme Greens infomercial, they had Guerrero return to Massachusetts to shoot a new version of the infomercial in late October. S.J. Ex. 7, at 84:1 - 84:7; S.J. Ex. 8 at 169:9 - 169:15, and Att. 1 (ITV-210) at 29:17 - 29:21; S.J. Ex. 12, at Att. 3, at 81:21 - 82:4, 82:14 - 82:24.

213. Unlike the original Supreme Greens infomercial, which had been filmed using a nighttime backdrop, the new infomercial was filmed using a daytime backdrop. S.J. Ex. 7, at 83:21 - 84:3.

214. Notes from a "DMC/ITV Office Meeting" on November 11, 2003 state "New version of Supreme Greens show is in editing stage. Waiting for feedback from the FTC from the original show and then we can finalize the new version." S.J. Ex. 9, at Att. 10, (ITV-81) at DMC041357.

215. On or about November 14, 2003, the FTC attorneys received a copy of an edited version of the Supreme Greens infomercial from counsel. S.J. Ex. 19, at ¶ 11; S.J. Ex. 7, at 115:4 - 115:12.

216. On or about November 18, 2003, in a telephone conversation with counsel, the FTC attorneys stated that the revised Supreme Greens infomercial represented a good faith improvement and that they would like to see it substituted immediately. The FTC attorneys stated that the DMC/ITV Defendants must have substantiation for all claims made in the revised version. Counsel for Barrett and DMC stated they would find out how quickly the revised version could be substituted for the original. S.J. Ex. 19, at ¶ 12.

217. ITV made a commitment to the FTC that it was only going to run the revised version of the Supreme Greens infomercial that it had sent to the FTC. S.J. Ex. 7, at 115:13 - 115:16.

218. On or about November 25, 2003, counsel for the DMC/ITV Defendants indicated to the FTC attorneys in an email that they believed that the revised infomercial had begun the "dubbing" process and was being "rotated into stations." S.J. Ex. 19, at ¶ 13.

219. Notes from a "DMC/ITV Office Meeting" dated November 25, 2003 state that

there are two new versions of the Supreme Greens infomercial and that the media department will “buy media to test these two shows next week – will compare the results.” S.J. Ex. 9, at Att. 10 (ITV- 81) at DMC 041361.

220. A November 26, 2003 email refers to two “FTC” versions of the infomercial – called Versions 7 and 8. S.J. Ex. 21, at 1221:17 - 124:2 , and Att. 3 (ITV- 99). *See also* S.J. Ex. 21, at Att. 2 (ITV-98) at DMC 037525 (Dec. 9, 2003 email identifying Versions 7 and 8 as “FTC approved”).

221. On or about December 3, 2003, counsel for the DMC/ITV Defendants indicated to the FTC that the revised Supreme Greens infomercial had been “dubbed and substituted in over two dozen stations,” and that “the changeover process [was] continuing.” S.J. Ex. 19, at ¶ 14.

222. In fact, the revised Supreme Greens infomercial did not replace the original version. The new Supreme Greens infomercial tested badly and was pulled from the air. S.J. Ex. 8, at 175:8 - 175:11, and Att. 1 (ITV-210) at 30:9 - 31:6.

223. A December 22, 2003 email sent to Donald Barrett, Bob Maihos and others reported the results for 24 airings of Version 7 between December 2 and December 19, 2003. The costs of those airings was \$21,930, but the gross revenue produced by those airings was \$14,181.68. S.J. Ex. 21, at 134:5 - 135:6, and Att. 4 (ITV-101), at DMC 041194.

224. The December 22, 2003 email also reported the results for 81 airings of Version 8 between December 2 and December 19, 2003. Again, these airings did not generate enough sales to cover the cost of the media time: the total cost of those airings was \$42,022.68 and the gross revenue produced by those airings was \$37,243.95. S.J. Ex. 21, at Att. 4 (ITV-101) at DMC 041196-96.

225. A December 1, 2003 email reporting the results of approximately 40 airings of the

original “SGRN” version of the infomercial on November 28, 2003 reports that these airings cost a total of \$16,277 and generated gross revenue of \$46,929.45. S.J. Ex. 21, at 140:13 - 140:18, and Att. 8 (ITV-105).

226. In January 2004, a number of emails were disseminated to Maihos, Barrett and others showing that multiple versions of the Supreme Greens infomercials were running simultaneously. S.J. Ex. 21, at 161:15 - 162:1, and Att. 9, 10, 11, 12, and 13 (ITV Ex. 123, 124, 126, 128, 130). For example, a January 12, 2004 email indicates that at least three different Supreme Greens infomercials – coded as SGRN, SGBB, and SGCC – were running. *Id.* at Att. 9 (ITV-123). *See also* S.J. Ex. 7, at 125:24 - 146:9 (Barrett acknowledges that more than one version was airing in January 2004).

227. On February 7, 2004, Katherina Mena, who was in charge of the media department, sent an email to Barrett stating “I was going over the results of the Supreme Greens shows that ran this Friday. I was so excited to see the results go up because we switched back to the original version Supreme Greens.” S.J. Ex. 7, at 149:21 - 150:7, and Att. 7 (ITV-106).

228. Barrett testified that he referred to the original version of the Supreme Greens infomercial by the call letters SGRN. S.J. Ex. 7, at 135:25 - 136:14.

229. On February 23, 2004, Barrett sent an email to “All Managers” stating that “We should now be using the original version Supreme Greens (SGRN).” S.J. Ex. 7, at 150:18 - 151:4, and Att. 1 (ITV-38).

230. The “original version” refers to the Supreme Greens infomercial filmed in April 2003 using the nighttime backdrop. S.J. Ex. 7, at 150:8 - 150:17.

231. Robert Maihos received a copy of Barrett’s February 23, 2004 email. S.J. Ex. 8, at 184:2 - 184:9.

232. On February 11-13, 2004, the Food and Drug Administration conducted an inspection of the premises of ITV and DMC, during which it collected Supreme Greens labeling materials, as well as a brochure and customer letter. S.J. Ex. 12, at ¶ 11 and Att. 9.

233. On April 19, 2004, the Food and Drug Administration issued a warning letter to ITV and DMC, in which it stated, among other things, that the claims on the DMC/ITV Defendants' website, www.todayshealth.com made it clear that Supreme Greens was intended to be used for the "cure, mitigation, treatment or prevention" of disease, and that other claims made in the labeling materials were unsubstantiated. *Id.*

234. Barrett stated in a sworn declaration filed in this action that upon being told by the FTC on April 7, 2004 that "the original Supreme Greens infomercial was running in certain media markets. We then investigated the matter, determined that certain stations were airing the original infomercial, and immediately notified all media outlets to cease running any of the Supreme Greens versions." S.J. Ex. 22, at ¶ 24.

B. The Advertising Claims for Supreme Greens Are False and Unsubstantiated

235. To establish that the DMC/ITV Defendants' claims about Supreme Greens are false and/or unsubstantiated, the FTC has submitted the testimony of expert witnesses Landon S. King, M.D. and Barrie Cassileth, Ph.D. S.J. Ex. 26 (King); S.J. Ex. 27 (Cassileth).

236. The FTC provided Dr. King's and Dr. Cassileth's reports to counsel for the DMC/ITV Defendants in March 2005. S.J. Ex. 20, at ¶ 3 and Att. 1.

237. The DMC/ITV Defendants did not attempt to depose either Dr. King or Dr. Cassileth. *Id.* at ¶ 4.

238. The DMC/ITV Defendants did not provide the Commission with reports from any experts in support of the DMC/ITV Defendants' claims about Supreme Greens efficacy in

preventing, treating, and curing disease, or as a weight loss product. *Id.* at ¶ 6.

239. Dr. King is an Associate Professor of Medicine and Biological Chemistry at the Johns Hopkins University School of Medicine and the Interim Director of the Division of Pulmonary and Critical Care Medicine. S.J. Ex. 26, at 1.

240. Dr. King has also authored or co-authored numerous journal articles and book chapters on various pulmonary and respiratory issues. *Id.* at 2.

241. Dr. King is an expert in the diagnosis and management of patients with pulmonary diseases and critical illness, both of which require an understanding of the body's relative acidity or alkalinity, the causes and effects in changes in that acid-alkaline balance, and the methods the body uses to keep that balance from changing. *Id.* at 1-2.

242. Dr. King stated that because both pulmonary and critical care medicine require the understanding, consideration, and treatment of the body's state of relative acidity or alkalinity (acid-alkaline balance, or pH balance), he is familiar with the causes and effects of changes in the body's pH balance, the methods the human body employs to keep this balance from changing, and the very limited circumstances where medical doctrine prescribes attempting to change the body's pH balance to treat or cure a medical condition. *Id.* at 1-2.

243. Dr. King stated that based on his professional training, expertise and experience, it was his opinion that there is no reliable scientific evidence that any chronic disease is caused by the body being too acidic. *Id.* at 3, 8.

244. Dr. King also stated that based on his professional training, expertise and experience, it was his opinion that there is no reliable scientific evidence that increasing the body's pH will effectively prevent, treat, or cure cancer, diabetes, arthritis, or heart disease. *Id.*

245. Dr. King stated that physicians typically understand the pH of the human body to